

Texas Justices Weigh Public Adjuster Laws In Speech Suit

By **Eli Flesch**

Law360 (October 26, 2023, 9:08 PM EDT) -- The Texas Supreme Court on Thursday weighed what kinds of behavior might be impermissible for roofing contractors under a state law prohibiting them from acting as public adjusters on the same claim, a conflict-of-interest rule now facing a First Amendment challenge.



Texas' top court weighed what kinds of behavior might be impermissible for roofing contractors under a state law prohibiting them from acting as public adjusters on the same claim. (AP Photo/Tony Gutierrez)

Justices asked sharp questions of both Stonewater Roofing Ltd. Co., which is challenging Texas' licensure laws for public adjusters, and the Texas Department of Insurance, or TDI, which said those statutes are commonplace protections meant to ensure professional competency.

"The challenged laws do not censor or discriminate against any information, ideas or opinions," said Evan S. Greene, the insurance department's lead counsel, in opening remarks. "In other words, the laws do not restrict speech as speech. They instead fall comfortably within Texas' broad authority to regulate the practice of a profession."

Justice Jane Bland started the questioning by asking Greene whether the Texas regulations prohibited contractors from claiming that they're an "insurance specialist" or a "leader in insurance claim approval," as Stonewater did on its website.

"The statutes do restrict advertising oneself as an insurance adjuster, but only to the extent that you don't have a license," Greene responded.

"So those two statements didn't contain anything about being an insurance adjuster," Bland pressed. "Are those two statements precluded by statute?"

"If someone advertises themselves as able to assist you with negotiating an insurance claim, with an insurer, which Stonewater does, that would be prohibited by the statutes if you don't have a license," said Greene.

Stonewater is not a licensed public adjuster in Texas, according to court documents.

Stonewater was first sued by a customer over the claims made on its website, according to court documents. That led to Stonewater suing the TDI in June 2020, saying the Texas laws impermissibly regulated commercial speech and were unconstitutionally vague. At the request of the TDI, a trial court dismissed the suit later that year, but it provided no explanation for its reasoning.

In February 2022, a panel of Seventh Court of Appeals judges revived the suit, deciding that Stonewater had **leveled proper allegations** against the TDI. The appeals panel also found that Stonewater had properly alleged that the Texas adjuster prohibitions were unconstitutionally vague and violated the 14th Amendment.

In a **July 2022 petition** to the state Supreme Court, the TDI said the state appellate panel's February decision reversing the dismissal of Stonewater's suit could have "sweeping negative effects" if applied to regulations of other professions.

In its state Supreme Court brief in May, Stonewater argued that there was no relevant historical evidence to support a First Amendment exception for occupational speech. The contractor said the original understanding of the amendment supported protection of such occupational speech from "prior restraints like licensing."

"When contractors try to persuade insurance companies to pay for their services, they're engaged in speech within the meaning of the First Amendment," Chase Cobern, a Munck Wilson Mandala LLP attorney representing the contractor, said Thursday.

"But that's different than negotiating on behalf of an insured, and don't your form contracts require your customers to agree to permit you to negotiate on behalf of an insured?" asked Justice Bland.

"That is the allegation in the underlying case, Your Honor," Cobern said.

Shortly after, Chief Justice Nathan Hecht asked Cobern whether Stonewater was arguing that Texas didn't have the authority to license adjusting at all.

"No, Your Honor. I think it depends on how we define 'adjusting,'" Cobern told Justice Hecht. He added, "Our position before this court at this stage is simply that the First Amendment applies and that the government should have to meet their burden. The government should have to justify that restriction of speech under strict scrutiny."

"What can the state license?" asked Justice Hecht. "You say 'divide between conduct and speech.' Where is that? Where's that line?"

"There are many professions engaged in nonexpressive content," Cobern said.

Greene said of the divide: "What matters in terms of whether it's a First Amendment problem is if the state is trying to restrict a message, ideas, information — or are they trying to restrict a course of conduct? And that's where you have to draw the line."

Representatives of the parties did not immediately respond to requests for comment.

The suit has garnered concern from several major industry groups over whether unlicensed contractors would put their own financial interests ahead of a policyholder's if they were permitted to act as adjusters. In Texas, lawmakers have resisted attempts to regulate roof contractors, while public adjusting remains a licensed profession, three industry trade groups said in an amicus brief filed days before the oral arguments.

"As a result of this unregulated environment open to anyone with a hammer and some nails, fraud and other improper conduct are widespread," the trade groups said.

The groups are the American Property Casualty Insurance Association, the National Association of Mutual Insurance Companies and the Insurance Council of Texas.

"It is important to our members that consumers are protected from deceptive practices and if needed, are able to utilize public adjusters who are licensed and act consistent with existing laws and requirements for avoiding conflict of interest situations," they said.

Stonewater Roofing Ltd. Co. is represented by Michael A. McCabe and Chase A. Cobern of Munck Wilson Mandala LLP.

The Texas Department of Insurance is represented by state Attorney General Ken Paxton and by Evan S. Greene, Brent Webster, Judd E. Stone II, Lesley French, Grant Dorfman and H. Melissa Mather of the Texas Attorney General's Office.

The case is Texas Department of Insurance et al. v. Stonewater Roofing Ltd. Co., case number 22-0427, in the Supreme Court of Texas.

--Additional reporting by Ben Zigterman. Editing by Khalid Adad.